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In The

Supreme Court of the United States

October Term, [redacted] 1969

No. [redacted] 13

WILLIAM L. MAXWELL,

Petitioner,

v.

O. E. BISHOP, Superintendent of Arkansas State Penitentiary,

Respondent.

BRIEF AMICI CURIAE OF THE NATIONAL COUNCIL ON CRIME AND DELINQUENCY

Sol Rubin
Jeffrey E. Glen
44 East 23rd Street
New York, N.Y. 10010
Attorneys for the National Council on Crime and Delinquency

Samuel B. Waterman
Of Counsel
700 N.E. 14th Avenue
Hallandale, Fla. 33009

TABLE OF CONTENTS

	Page
Statement of Interest of the Amicus	1
Argument	
I. An Inherent and Unavoidable Vice of the Death Penalty is that in All Cases Persons Executed Are Deprived of Due Process of Law	3
II. The Requirement of Criteria	4
III. Courts Must Examine the Physical and Psychological Cruelty of Executions	10
Conclusion	16

TABLE OF AUTHORITIES

	Page
Cases:	
Arizona v. Fenton, 86 Ariz. 11, 341 P. 2d 238 (1959), cert. denied 361 U.S. 877	5
Commonwealth v. Cater, 396 Pa. 172, 152 A. 2d 259 (1959)	7
Ex Parte Medley, 134 U.S. 160 (188)	12
In re Kemmler, 136 U.S. 436 (1890)	12
Louisiana ex rel. Francis v. Resweber, 329 U.S. 459 (1947), reh. denied 330 U.S. 853	10
Musselwhite v. State, 215 Miss. 363, 60 So. 2d 807 (1952)	12
North Carolina v. Pearce, ___ U.S. ___, 89 S. Ct. 2072 (1969)	7, 8
Pope v. United States, 392 U.S. 651 (1968)	4
Rudolph v. Alabama, 375 U.S. 889 (1963)	4
Stroud v. United States, 251 U.S. 15 (1919)	7
United States v. Jackson, 390 U.S. 570 (1968)	4
Weems v. United States, 217 U.S. 349	4
Witherspoon v. State of Illinois, 391 U.S. 510 (1968)	3
Statutes:	
New York Laws of 1888, ch. 489	11

TABLE OF AUTHORITIES
(Continued)

Other Authorities:

	Page
Comment, "The Death Penalty Cases," 56 Calif. L. Rev. 1268	16
Bluestone and McGahee, "Reaction to Extreme Stress: Impending Death by Execution," Am. J. of Psychiatry, November 1962	13
Comment, "The Right to Non-discriminatory Enforcement of State Penal Laws, 61 Colum. L. Rev. 1103	9
Gottlieb, "Testing the Death Penalty," 39 So. Cal. L. Rev. 268	10
Rubin, "Disparity and Equality of Sentences— A Constitutional Challenge," 40 F.R.D. 55	9
Rubin et al., The Law of Criminal Correction, (West Pub. Co. 1963)	11, 12
Rubin, "Sentences Must Be Rationally Explained," 42 F.R.D. 203	3
Rubin, "The Supreme Court, Cruel and Unusual Punishment, and the Death Penalty," 15 Crime and Delinquency 121	15

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1968

No. 622

WILLIAM L. MAXWELL,

Petitioner,

v.

O. E. BISHOP, Superintendent of
Arkansas State Penitentiary,

Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Eighth Circuit

BRIEF AMICI CURIAE OF THE NATIONAL COUNCIL ON CRIME AND DELINQUENCY

Statement of Interest of the Amicus

The National Council on Crime and Delinquency is a non profit membership corporation, incorporated under the laws of the State of New York, with a membership of over 60,000 citizens and officials. It was organized in 1907 and incorporated under the name of the National Probation Association in 1921.

The National Council is concerned with the prevention, control, and treatment of crime and delinquency. It has inves-

tigated the relationship between capital punishment and crime and delinquency, and has concluded that the use of capital punishment is not justified as a crime control tool, and that in fact it has a deleterious effect on efforts to reduce the incidence of criminal behavior in this country through correctional rehabilitation.

The Board of Trustees of the National Council therefore adopted a resolution condemning capital punishment at its meeting on April 22, 1963. This action was ratified by the membership of the Council at the annual meeting held on June 10, 1963, through the adoption of the following resolution:

> *Whereas* the death penalty is the antithesis of the rehabilitative orientation of modern scientific penology, and
>
> *Whereas* it has been demonstrated throughout history that the death penalty has not been a deterrent to crime,
>
> *Be it resolved* that the National Council on Crime and Delinquency recommends the abolition of the death penalty in all jurisdictions.

The resolutions, with a supporting analysis of the data, are printed in *Crime and Delinquency*, April, 1964, at pps. 105-109.

In furtherance of the positions taken in these resolutions, and in an effort to bring before this Court certain aspects of the overall capital punishment problem that were not stressed in this case below, the National Council on Crime and Delinquency sought and obtained the consent of the parties to the filing of an *amicus curiae* brief by the National Council. Copies of their letters will be submitted to the Clerk with this brief.

ARGUMENT

I.

An Inherent and Unavoidable Vice of the Death Penalty is That in All Cases Persons Executed Are Deprived of Due Process of Law.

The death penalty inevitably deprives any person who has been executed of due process of law. Killing a convicted man renders due process of law inoperable. It is an inherent vice that cannot be remedied except by abolition of the death penalty, to protect due process, if on no other ground.

When the condemned man is executed, errors in the proceedings are placed beyond the reach of later decisions that would provide new grounds for examining whether the proceedings leading to the execution contained error. The prejudiced-jury case decided by the Supreme Court has held that a death sentence imposed by a jury from which were excluded men who indicated they were opposed to the death penalty, was not representative of the community. *Witherspoon v. State of Illinois*, 391 U.S. 510 (1968).

This new doctrine, this Court holds, is retroactive; it applies to those in death rows all over the country. But it also means that among those who have already been executed, there were many whose cases would have to be reopened—if they were alive. Their execution deprived them of due process of law.

Furthermore, a dissenting opinion held that the majority did not go far enough. Said Justice Douglas, "I see no constitutional basis for excluding those who are so opposed to capital punishment that they would never inflict it." Suppose that juries conforming to the *Witherspoon* standard decree more executions—and that presently, as has happened often, the

dissenting view becomes the majority view. Any persons executed under the *Witherspoon* rules but in violation of the dissenting view would then be in a legal position to challenge their death sentence—if they were alive. Due process too late is due process denied, decidedly so in death sentence cases.

The Supreme Court invalidated the death penalty provisions of the Federal kidnapping law and the Federal Bank Robbery Act. *United States* v. *Jackson*, 390 U.S. 570 (1968); *Pope* v. *United States*, 392 U.S. 651 (1968). But six men were executed under the kidnapping law, according to a newspaper survey. New York Times, April 9, 1968. Surely they were deprived of due process of law—and every man executed is similarly deprived of due process of law, since he cannot be given the benefit of new holdings or of the finding of new facts that might be sufficient to reopen his case.

Turning to the instant case—what if the Court upholds the death sentence and the sentence is carried out? Members of the Supreme Court have already indicated their view that capital punishment for a crime less than murder is so disproportionate as to constitute cruel and unusual punishment, within the rule of *Weems* v. *United States*, 217 U.S. 349 (1909). *Rudolph* v. *Alabama*, 375 U.S. 889 (1963).

It is not at all beyond possibility that presently, perhaps within a few years, this Court will adopt that view. Then this defendant, if already executed, will have no recourse to be spared the death penalty under this Court's rules. There is only one way to protect the due process of rights of this defendant—by repudiating the death penalty.

II. The Requirement of Criteria

It has been suggested that due process of law requires that sentences should be consistent with the evidence in the record,

and should be rationally explained. Rubin, "*Sentences Must Be Rationally Explained*," 42 F.R.D. 203 (1967). It cites one death sentence case, upheld by the Arizona Supreme Court. *Arizona* v. *Fenton*, 86 Ariz. 11, 341 P. 2d 238 (1959), cert. denied, 361 U.S. 877. The defendant, twenty-four, lived with the decedent and her husband, owners of a drug store, for about a month, doing odd jobs for them. Then, having secured a full-time job, he was asked to vacate his room when out-of-town guests were expected for a visit. The decedent gave the defendant $20 when he left, and she offered further help. Ten days later the defendant returned to decedent's home, demanded $200 of her, and was given $40. Not satisfied, he hid in the house and, when she returned, he struck her with a gun. He claimed that when he struck her the gun went off accidentally, and that he became panicky and shot her several more times.

Prior to imposition of sentence the defendant was examined by a psychiatrist and a psychologist, who found that the defendant was psychopathic. They reported that a person of his mental condition did not "often profit by incarceration," and that the only treatment is a "protective environment such as institutional care." The defendant's history was one of numerous assaults and inability to hold a job or get along with people. Before imposing sentence the trial judge gave his version of what he had been told by the doctors in these words: "At the present time they have no cure for him; prison will not help the man and if he were to be released—and I confess I have taken that into account as a possibility, . . . he would perhaps and probably, at least in the present state of medical science, be a danger to the community." The sentence was upheld.

The Arizona Supreme Court overlooked the fact that the sentencing judge's rationale was in conflict with the psychological findings. "No cure for him; prison will not help the

man," the sentencing judge said, whereas the psychiatric report said that such individuals do not often profit by incarceration but that the only treatment is institutional care—a view which the court rejected.

The trial judge had also written, "If example will do any good at all; a man's life might be saved in the future and if it were saved, I know it would be a better life than this man's"—but, as the psychiatrist stated and as he is quoted by both the trial judge and the Supreme Court, the characteristic of sociopaths and psychopaths is that they do not learn.

Here a death sentence is upheld contrary to any rational justification, indeed, in contradiction to the information about the defendant found in the record. This result may be contrasted with another case of three death sentences, two of which were reversed by another state supreme court. Three young men planned to rob a pharmacy. One of them, Williams, led the proprietor to the rear of the store, and after warning him to "shut-up" shot and killed him. Williams and his co-defendants, Cater and Rivers, pleaded guilty. All were sentenced to death for the murder.

The Supreme Court of Pennsylvania said: "The sole and important issue presented by these appeals is—did the court below err in sentencing each defendant to death? . . . The steadfast refusal of this Court to limit in any respect the discretion in sentencing given a trial court is in accord with the prevailing American view. . . . While we do not substitute our judgment for that of the sentencing court, we look to see in every capital case whether the trial court abused its discretion by overlooking pertinent facts or disregarding the force of evidence, or erred in its law. . . .

"In its opinion, the court *en banc* discussed the culpability of all three appellants together and in so doing inadvertently

applied certain statements made in the confession of one of the appellants equally to the others. Thus, the court erred in stating that 'all three [defendants] went to Cater's house to procure the gun long before the holdup.' The fact is that there is no evidence in the record to support this statement as against Cater or Rivers. Similarly, the court was mistaken in its belief that as to Caters and Rivers the motive for the crime was 'the discharge of aggressive hatred.' Again, there is no evidence to support such a characterization." *Commonwealth* v. *Cater*, 396 Pa. 172, 152 A. 2d 259 (1959).

The requirement of rationality in a sentence should be especially required in capital cases. If the sentence is by a jury then they must be suitably instructed as to the circumstances justifying a death sentence; if by a judge, then he should give reasons for death.

In a decision in June, 1969, the Supreme Court endorsed the use of criteria and findings in certain sentencing situations. In *North Carolina* v. *Pearce*, 89 S. Ct. 2072, it held that upon a second sentencing after a new trial is ordered, the second sentence may exceed the sentence imposed after the first trial only if new data are present. Then it said: "We have concluded that whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding."

Sentencing in death cases was referred to in *North Carolina* v. *Pearce*.. The Court cited *Stroud* v. *United States*, 251 U.S. 15 (1919), in which it held that a defendant who received a life sentence for first degree murder, upon securing a reversal of the conviction could be retried for first degree murder and

sentenced to death. With the requirements now made mandatory in *North Carolina* v. *Pearce*, such a death sentence can be imposed only if "the reasons . . . affirmatively appear." Should not *any* death sentence be based upon reasons?

The need for this is emphasized by the disposition of the Court of Appeals in the present case in rejecting the presumption petitioner seeks to draw from the statistics of discriminatory sentencing. The Court says (p. 39 et seq. in appendix) that it rejects the inference from the statistics because: "1. They do not relate specifically to Garland County where this particular offense was committed and where Maxwell was tried and convicted. . . . 2. They admittedly do not take every variable into account. 3. They do not show that the petit jury which tried and convicted Maxwell acted in his case with racial discrimination."

Without acknowledging that this argument is sufficient to overcome the presumption of discrimination to be drawn from the statistics, the Court of Appeals has thus stressed the importance of recognizing that there are factors that may be operative in the mind of the jury. The factors are indeed important. If this were a capital case to be disposed of solely by the judge, it would be important for him (the Court of Appeals implies) to somehow deal with the factors leading to a sentence of death.

All the more reason, therefore, that somewhere the ingredient of rationality in the sentence be required, at least in a capital case (rather than—least of all in a capital case). As is pointed out in the petitioner's brief, at p. 31, the Arkansas Supreme Court considers itself powerless to review a death sentence, whereas it does reduce jury-fixed sentences in non-capital cases. This is topsy-turvy. Due process should require that at least equal review be given in capital cases; but of course, to

review such a sentence requires either findings, the giving of reasons, or criteria contained in jury instructions.

The Court of Appeals in rejecting the claims of petitioner on discriminatory application of the death penalty to Negroes, said—"At oral argument we asked Professor Amsterdam, counsel for Maxwell, whether (apart from any Eighth Amendment argument) his statistical approach would not mean that it would be constitutionally impossible for a negro defendant in Arkansas ever to receive the death penalty upon conviction of the crime of rape of a white woman. The answer given us was in the affirmative, that is, that it would be constitutionally impossible. At the same time it was conceded, in contrast, that it would be possible for a white man to receive the death penalty upon his conviction for rape. When counsel was asked whether this would not be discriminatory, the reply was that once the negro situation was remedied the white situation 'would take care of itself.'"

More needs to be said on this point. Applying rationality and constitutional requirements to sentencing may well require a readjustment of past and current practices. Let us assume that because of one vice or another, a ruling might result in invalidating execution of Negroes for rape. Then, says the Court of Appeals, could a white man be executed for rape of a white woman? It feels that the affirmative answer is unacceptable. But if the requirement of equality is to be applied to death sentences for rape, and Negroes cannot be executed, then whites cannot either. See comment, *The Right to Nondiscriminatory Enforcement of State Penal Laws*, 61 Colum. L. Rev. 1103 (1961); Rubin, *"Disparity and Equality of Sentences — A Constitutional Challenge"* 40 F.R.D. 55.

Where is the disaster in this outcome? Do we devotedly wish to execute somebody for rape, and if it will not be whites,

let it be Negroes? If in fact—which is what we earnestly contend—there is no rationality in the death penalty, and none can be found once the rudiments of due process of law are applied, what is it that is being contended for by the state, and sustained by the Court of Appeals? That the state may say "die" to a defendant without giving reasons or justification. If that is the reality of our current law, it ought to be countenanced no longer, for its constitutional defects.

III.

Courts Must Examine the Physical and Psychological Cruelty of Executions.

For an execution to be approved by any court, the obstacle—if it is one—of the Eighth Amendment must be overcome. The Supreme Court has a number of times held that the death penalty does not violate the Eighth Amendment. But it has not examined the cruelty that may be involved in the execution itself.

The Supreme Court has said: "The cruelty against which the Constitution protects a convicted man is cruelty inherent in the method of punishment, not the necessary suffering involved in any method humanely employed to extinguish life humanely." *Louisiana ex rel. Francis* v. *Resweber*, 329 U.S. 459 (1947), reh. denied, 330 U.S. 853.

The Court in that passage has used the word "humanely" twice, to apply to the *method of* execution. Yet, as one commentator observed, "Careful review of the opinions and close analysis of the language of the decisions support the view that the constitutionality of capital punishment depends on questions of judicially noticeable fact. The evidence, responding to the language and opinions of the judges, has not heretofore been presented in any of our courts." Gottlieb, "*Testing the Death Penalty*," 39 So. Cal. L. Rev. 268, 270 (1961).

At least one state legislature was led to abolish the death penalty through the cruelty of hanging. An unauthorized reporter witnessed a hanging—of a man who to the end claimed that he was innocent—in which the rope was too long, and the victim had to be held up while the sheriff and deputies pulled on the rope. As reported in the St. Paul Dispatch, Feb. 13, 1906, death came by strangulation after fourteen and a half minutes. The report praised the demeanor of the condemned; the headline read, "*DISPLAYED HIS NERVE TO THE VERY LAST.*" As for the crowd, the reporter wrote: "The spectators who saw the execution were in haste to make their departure after it was over. 'Yes, I saw it,' said one. 'But, ugh, I never want to see another one.' It is safe to say that the feature of a crowded execution was eliminated by Sheriff Miesen; but, if the number of persons who left the jail at its close are any index of the number who saw it, it is certain that the six persons designated in the law as the number the sheriff may personally invite was unmercifully stretched. People of a morbid turn, attracted by the hangings, began to gather around. The three sides of the building were lined by them. All were eager to catch a glimpse of the condemned man as he walked from his cell to the waiting elevator that was to lower him to the basement, where death awaited him." The next day the press reported the governor's outrage at the sheriff's behavior in admitting twenty-five or thirty people, and particularly at the admission of reporters. But the protest was on; and the state of Minnesota abolished the death penalty in 1911. See Rubin et al., *The Law of Criminal Correction*, 318, 324, n. 47 (1963).

Eighty-one years ago a New York governor who sought and obtained passage of a bill to substitute electrocution for hanging (Laws of 1888, ch. 489) said: "The present mode of executing criminals by hanging has come down to us from the

dark ages, and it may well be questioned whether the science of the present day cannot provide a means of taking the life of such as are condemned to die in a less barbarous manner." The Supreme Court quotes these words two years later, *In re Kemmler*, 136 U.S. 436 (1890), but still it upheld hanging, *Ex parte Medley*, 134 U.S. 160 (1889), as well as electrocution.

The Court has not considered the mental cruelty imposed not only on the one who is being executed but also on many other persons who are under sentence of death but will not be executed because of innocence or legal error or clemency. Reprieves are granted only minutes before an execution is scheduled to occur. A man sentenced in Texas to die for the rape-murder of a three-year-old was reprieved less than three hours before he was to die, upon the confession of another man to the crime (New York Post, Feb. 5, 1958); John Resko was reprieved twenty minutes before his scheduled execution—Resko, *Reprieve* (1956). But Burton W. Abbott was executed in California on March 15, 1957, two minutes before the governor's reprieve was telephoned to the warden (New York Times, March 16, 1957), and often, apparently as regular practice, commutations are granted only shortly before the scheduled time of execution. See Rubin et al., op. cit. supra at 340, n. 132.

The Court did say, in 1889, "when a prisoner sentenced by a court to death is confined in the penitentiary awaiting the execution of the sentence, one of the most horrible feelings to which he can be subjected during that time is the uncertainty during the whole of it, which may exist for the period of four weeks, as to the precise time when his execution shall take place." *Ex parte Medley*, *supra*.

In 1952 in the case of *Musselwhite* v. *State*, 215 Miss. 363, 60 So. 2d 807 (1952) the Mississippi Supreme Court indefinitely stayed an execution. It said: "There is agreement

among the examining physicians that at the time of the hearing the petitioner had lost awareness of his precarious situation. . . . If he were taken to the electric chair, he would not quail or take account of its significance. There is reaction neither to audible nor physical stimuli. He takes no nourishment voluntarily. . . . We accept therefore the finding that the petitioner is insane and that such insanity has befallen him since his conviction nearly two years ago. . . . We declare immunity to any clamor of vengeance or to the moving recitals of a brutal murder heretofore adjudged and condemned. We are content to stand upon ground higher than the common urge of outraged reprisal which revives the *lex talionis*, demanding a life for a life."

It is true that the evidence here was considered in the context of the rule that an insane person may not be executed. But the facts recited by the court suggest that the insanity was the result of the imposition of the death sentence; and it is significant in demonstrating the kind of evidence that may be brought to bear on the general psychological results on persons committed to await death.

One study of that kind was made by Dr. Harvey Bluestone and Carl L. McGahee, published in an article entitled, "*Reaction to Extreme Stress: Impending Death by Execution*," Am. J. of Psychiatry, November, 1962. In the group of prisoners studied, a variety of destructive phenomena occurred to all their personalities, with perhaps one exception, including symptoms of psychopathy, delusion, a variety of obsessions and degrees of withdrawal.

It is even easier to bring to bear the evidence of physical cruelty. The physical cruelty of the actual execution has at times been described. Alabama uses the electric chair in its executions. In articles in the Montgomery Advertiser, Danielle

Harris described what happens, as told to her by officer McDaniel, who had witnessed about twenty executions, and Lt. W. L. Traywick, who had witnessed eight.

The final switch is thrown and the electricity strikes the body which stiffens violently.

The clenched fists whiten and turn slowly upward as the current builds up to a maximum of 2,500 volts. This is a reflex action. A blister begins to rise on the lower left leg beneath the electrode.

The noise is loud. The dying man fights the straps with amazing strength. Unusually, some smoke rises up from the chair.

"It is a most violent death but it's over in 40 seconds," said Traywick. (October 23, 1961)

• • •

Rex Thomas, Associated Press writer here, has probably witnessed more electrocutions than anyone in Alabama. He describes unforgettable death chamber scenes.

Years ago, a Negro boy and his brother were sentenced to die one week apart. After the first was electrocuted, his brother was so emotionally upset that during the death walk, he broke away from guards and lunged into the electric chair. Thomas commented, "the boy just couldn't wait to meet his maker."

Thomas has seen bodies catch on fire in the chair, filling the death chamber with smoke and the smell of burning human flesh.

"That's something you just don't forget," he said.

The body will burn if it requires a second or third jolt or if the condemned perspires excessively.

One guard said the worst part of an electrocution is removing the hood from the head of a man who is badly burned.

Ordinarily, however, the body requires only one jolt of electricity and does not burn, or burns only slightly where the electrodes are attached to the head and lower left leg.

The jolt caused a man's eyeball to fall from its socket in one case.

Another time the waist strap broke while a big, powerful Negro was being electrocuted. "He darn near came out of that chair," said Thomas.

The black hood has been known to drop down, revealing the face of the dying man.

False starts are uncommon but have occurred.

"One of the worst cases I've ever seen," said officer Alford, was a Negro from Troy convicted of murder. He fought us all the way to the death chamber. Several of us had to overpower him to get him strapped in the chair."

Guards have been known to "go all to pieces" during episodes such as these. "Some just can't take it." "Their nerves just don't hold up."

"The guards are always nervous before and during an electrocution," said Alford. "In my opinion it's something you never become accustomed to. It's the most gruesome job I've come in contact with during my 35 years with the department." (October 25, 1961)

(Excerpts reprinted in Rubin, *The Supreme Court, Cruel and Unusual Punishment, and the Death Penalty*, 15 Crime and Delinquency, 121, 128-29 (1969).)

For additional sources see comment, "The Death Penalty Cases," 56 Calif. L. Rev. 1268, 1332-1343.

The Supreme Court having said that in the application of the death penalty the Constitution protects against "cruelty inherent in the method of punishment," and also that any method of execution must be "humanely employed," a trial court must consider the question of cruelty involved in the mode of execution ordered. Its failure to do so is a defect in the proceedings. If there is no humane way to execute a man, this is as effective a bar to any execution as the realization that, once criteria are established and applied, there is no rationality to the execution itself.

CONCLUSION

For the foregoing reasons, amicus urges that the judgment of the Court of Appeals be reversed.

Respectfully submitted,

Sol Rubin
Jeffrey E. Glen
44 East 23rd Street
New York, N.Y. 10010
Attorneys for the National Council on Crime and Delinquency

Samuel B. Waterman
Of Counsel
700 N.E. 14th Avenue
Hallandale, Fla. 33009

Dated: August 29, 1969